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**CERTIFICATE**

I, Susan Gellerman, do hereby certify that the following pages, numbered 1 through 57, embody a true and accurate transcript. Prepared under my direction by Fantastic Transcripts to the best of our abilities, it includes the designated portions of the CD encoded in the For The Record tamper proof format provided to me by Kenneth W. Salinger, Attorney at Law. The trial or hearing was held at the United States District Court for the District of Massachusetts, Western Division in Springfield MA in the case of Springfield Library and Museum Association, Inc. v. Knoedler Archivum, Inc., before Judge Kenneth P. Neiman on January 26, 2004, Docket Number 03-CV-30219.



Susan Gellerman, President  
Fantastic Transcripts



Date

1 - (inaudible) 03-30219, Springfield Library and Museum Association versus

2 Knoedler Archivum.

3

4 J: OK, (inaudible) please be seated. If you could state your name, I'll start on to my

5 right, please?

6

7 MASON: Good afternoon, Your Honor, Mark Mason for plaintiffs, Springfield Library

8 and Museum Association, Incorporated.

9

10 J: OK.

11

12 SALINGER: Good afternoon, Your Honor. Ken Salinger for defendant, Knoedler

13 Archivum. With me is Andrea Centiro.

14

15 J: OK. This matter has been referred to me by Judge Ponsor for a, um, Court  
16 recommendation with regard to the, uh, defendant's motion for judgment on the  
17 pleadings. And let me, uh, ask a couple of preliminary, uh, matters here. As I  
18 understand the procedural history, there was a complaint filed, then the motion for  
19 judgment on the pleadings was filed. There was an answer filed. Then the motion  
20 for judgment on the pleadings was filed. And then there was a motion, uh, to  
21 amend the complaint, uh, which I allowed without opposition. Uh, and I guess, uh,  
22 my first question is, uh, a very practical, uh, question. I'm assuming that the  
23 motion for judgment on the pleadings is directed at the second amended - that -  
24 this first amended complaint, if you will, and not - and no longer the amended  
25 complaint. Is that fair to say?

1

2 SALINGER: That's correct, Your Honor.

3

4 J: OK. And the second part of that question is, uh, I noticed - and I - I didn't do a  
5 chart, but I noticed that in the - that there were more documents, if you will, cited  
6 in this - in the amended complaint than there were in the original complaint. And I  
7 noticed that in the answer to the amended complaint, there were no documents  
8 attached, as - as there had been in response to the first complaint. And I guess my  
9 question is why - why is that. Uh, particularly in the context of the motion for  
10 judgment on the pleadings, I have to look at something, was it because, in part at  
11 least, that the amended complaint included certain allegations that quoted  
12 sufficiently from some of the documents which were part of the defendant's first  
13 answer and you didn't need to repeat those or etc., etc.?

14

15 SALINGER: In - in short, yes, Your Honor. The second amended complaint quotes from  
16 - and attaches to it, incorporates in it, uh, I believe it's five different letters. Those  
17 are the majority of the letters that we had attached to the original answer. The let -  
18 the correspondence attached to the second amended complaint, in and of itself, is  
19 sufficient to show the defendant's claims are time barred. And so in an effort to,  
20 uh, keep things relatively simple, we felt at that point there was no need to attach  
21 further correspondence to the answer to the second amended complaint.

22

23 J: But are there - if I were to read the complete - first amended complaint first,  
24 together with the answer there, together, and then if I were to go and look at your

1 answer to the first amended complaint, would I see things there in the documents  
2 that you attached that -

3

4 SALINGER: Oh -

5

6 J: - that's not part of the factual information, if you will, that's been presented to me  
7 in the context of the amended complaint and the answer?

8

9 SALINGER: There would be -

10

11 J: Because there are cert - there are certain documents, I know, that - that don't seem  
12 to be before me, if you will -

13

14 SALINGER: I - I believe that there were two additional letters that had been attached to  
15 the original answer to the amended complaint -

16

17 J: Something having to do with things that happened in February, I believe -

18

19 SALINGER: Yes.

20

21 J: - in 2000 or thereabouts?

22

23 SALINGER: Yes. Urn, what you would see if you just looked at the attachments to the  
24 current complaint, the second amended complaint, are the - the documents showing  
25 that the painting was bought in 1955, the key aspects of the 1966 correspondence

1 making clear that, uh, the museum was on notice as of January of 1966 that the  
2 Italian government wanted this painting sent to it. Uh, there are - one, two, three -  
3

4 J: So - so - OK, go ahead.

5

6 SALINGER: Uh, four different 1966 letters attached there, and um, you would see on the  
7 face of the complaint itself, uh, that in those letters, uh, the museum said, uh, let -  
8 let's just keep this quiet. In essence, let's hope it blows over and -

9

10 J: But it said a lot of things. So - but - but is what you're saying is that you didn't  
11 need to, um, refer to certain, uh, documents which you had attached to your original  
12 answer because that concerned events that occurred in 2000 which don't deal with  
13 the - the more, um, particular issue that's before - before the Court, namely the  
14 statute of limitations issues around 1966, etc.?

15

16 SALINGER: That's - that's fair. Once the complaint was amended a second time, it then  
17 incorporated enough of the documentary history that there really was no need, for  
18 purposes of this motion, to present any additional information, and it seemed, uh,  
19 cleaner to rely on the plaintiff's own attachments to its own second amended  
20 complaint at that point.

21

22 J: OK. Now do you - would you have any objection if somehow I found it  
23 appropriate to make reference to some of these other documents in the course of  
24 examining whatever it is that I need to examine here, to examine those documents  
25 in the context of this motion? I mean, I - I - because I - I don't know exactly what

1 I might be missing, uh, and I - the second part of that is, um, do you believe in  
2 essence that this is really a motion and I should treat it as a motion for summary  
3 judgment and the standards around summary judgment, rather than the standards of  
4 the - on Rule 12? Um, because I may be looking at documents that are outside the  
5 narrow confines of the amended complaint and the answer to the amended  
6 complaint, namely something that might be in the answer to the first amended - the  
7 first complaint.

8

9 SALINGER: If I may, I'll take those questions in reverse order.

10

11 J: OK.

12

13 SALINGER: Uh, we're asking the Court to treat this not as a summary judgment motion,  
14 and we do so primarily, Your Honor, because we don't want to, and we haven't so  
15 far, but we don't want to be in a situation where the plaintiff says, oh Judge, we -  
16 we need discovery in order to respond to that. We think that would not be  
17 appropriate, we mean it's clear on the face of the pleadings that these claims are  
18 time barred and that the defendant should not have to go any further in this  
19 litigation. That said, give the particular, uh, sequence of pleadings that have been  
20 filed, we certainly would have no objection, Your Honor, uh, to the Court treating  
21 all of the attachments to any of the pleadings as part of the pleadings that can be  
22 considered by Your Honor in ruling on the motion for judgment on the pleadings.

23

24 J: But the Rule 12 - but still under Rule 12?

25

1 SALINGER: Yes.

2

3 J: (inaudible) go ahead. Mr. Mason, your views on - on that - those series of  
4 questions having to do with what's before me, what the standards are, etc.?

5

6 MASON: Certainly. We anticipated those questions, and indeed I raised the very first  
7 question that you posed on the review on the - to Palmer Dodge. Amy Berks is the  
8 associate on this matter, and he contacted (inaudible) some clarification, where I  
9 honestly expected a renewed motion for judgment on the pleadings once this Court  
10 had endorsed the second amended complaint. In that regard, assuming we can  
11 proceed, but the, uh - the motion sitting before you and the memorandum before  
12 you, as well as its opposition, all referred to a pleading which is the first amended  
13 complaint, which is a nullity at this point. Um, and we think all referred to the  
14 second amended complaint and its answer. But you don't have, um, any of the  
15 written materials, so to speak, that relate to the second amended complaint and its  
16 answer before you. Having raised that issue, I was assured that, um, Knoedler, um,  
17 intended to go forward as we are going forward today. Um, I simply -

18

19 J: Well, what - what I'm being told, though, by Mr. Sal - um, Salinger is that he does  
20 in - indeed intend for me to be making reference to whatever materials there are in  
21 the second - in the - in the amended complaint. And I guess what you're saying,  
22 maybe, the - the opposite. Since the - I - I can, in fact, view everything that's been  
23 filed in - with respect to answering the original complaint, because that's what the  
24 motion is directed at, and therefore the answer to that, and that with the consent of

1       the parties, I can also look at whatever other documents have been proffered in the  
2       context of the amended complaint.

3

4       MASON: Well, I concur with your assessment, and on the - my, uh, full counsel's  
5       acknowledgement, that the motion is directed to the second amended complaint.  
6       That's the (inaudible) of the Court. As such, all the documentation that is  
7       referenced in the second amended complaint is before you. That's how I perceive  
8       it. My simple point is that as a matter of the written briefs that you have before  
9       you, they relate to a different stage of the pleadings.

10

11      J:     I understand. But - but as - OK, so we -

12

13      MASON: And it's (inaudible).

14

15      J:     - we have an agreement, uh, it - it would appear that I can look at the documents  
16       that are both complaints and answers, in essence. The second question, though,  
17       now is the standard here to - to be used. You may have taken on, perhaps, a more -  
18       do - do you believe that it's under Rule 12 or under Rule 56, and are you trying to  
19       avoid - or Mr. Salinger, what you in fact did say, uh, which is that there - at least in  
20       the first, um, prong of an argument is that it's not, um - the Court's not - recog -  
21       can't rule on it because you need to discover the material?

22

23      MASON: Yeah that's a (inaudible) concern that, um, but we raised the first few on the  
24       question we did not want (inaudible) on rule 56 on this (inaudible). Uh, so in that

1 regard, we agree to this through a (inaudible) motion and a 12C standard applies to  
2 this matter for the exact reasons that, um, Attorney Salinger has articulated.

3

4 J: But you still argue that - when - when had you filed your opposition? Had you  
5 filed your opposition prior to filing your amended complaint?

6

7 MASON: Uh, yes.

8

9 J: OK. So at that point, your argument - one of your arguments was that there were  
10 issues of fact remain in dispute, right?

11

12 MASON: That's correct.

13

14 J: And - and judgment on the pleadings is inappropriate?

15

16 MASON: That's correct.

17

18 J: Now - has that argument gone by the wayside in light of the fact that you have, uh  
19 - that you amended your complaint that added certain documents and -

20

21 MASON: (inaudible) it's been enhanced, actually, um, and it was not our perspective that  
22 we needed to, um, set forward the complaint with the level of sophisticate that we  
23 now have done so. And um - and certainly I would apologize to the Court if - if  
24 the standard were otherwise. It was not our intention to mislead as has been  
25 suggested. Um, but - but there are genuine (inaudible).

1

2 J: You still believe that, is what I'm saying?

3

4 MASON: Yes, absolutely.

5

6 J: You still believe that?

7

8 MASON: Absolutely.

9

10 J: Now, let me also say that there are certain things, even if I were to look at the  
11 documents, all the documents, that there are references to yet other documents that  
12 I do not have -

13

14 MASON: Yes, that's correct.

15

16 J: Uh, some other correspondence between the parties, I believe, and in addition to  
17 that, uh - for example, I think there was a draft letter that was being - that was -  
18 there was a letter which the museum believed had been sent by the gallery - by -  
19 by the art dealer to the Italian government. And then subsequently, it was made  
20 clear that that letter had never been sent. And I think the - the response was, oh  
21 thank goodness we didn't send that, or something like that. But I don't have a copy  
22 of that letter. I don't have a copy of some other correspondence, and I don't have a  
23 copy of, uh, correspondence from the Italian government. There are certain things  
24 absent from the record, and I - I'm saying the defendant feels that that's not  
25 necessary for the Court to rule on this particular motion, but I just want to say is

1       that correct? That - that there are certain things that I don't have here that  
2       somehow I've missed?

3

4       MASON: Absolutely. Uh, and those (inaudible) excellent questions.

5

6       J:      Let me ask, uh, another question of you, Mr. Mason before we go to the, uh,  
7       underlying argument. You have a - you have seven, um, counts here, uh, and all  
8       with perhaps a variety of statutes of limitations -

9

10      MASON: That is correct.

11

12      J:      Urn, but is it - is it your position that all of them relate to the original contract,  
13       namely the bill of sale, the 1955 is it?

14

15      MASON: All except for the 93A claim, which relates to the demand made on October 4',  
16       value of the painting, which was set forth on December 14, 2001. I believe with  
17       Deborah Basile? (sp?)

18

19      J:      But - but does that not in turn relate to -

20

21      MASON: Yes, it does. But the 93A count itself draws its cause of action from that 2001,  
22       that certainly acknowledged that 93A, um, existed in 1955.

23

24      J:      The - basically the failure to pay?

25

1 MASON: That - that's correct.

2

3 J: And - and let me just ask as a - as a matter - as an aside here, the three - there's a  
4 \$3 million claim that was made, and is - is that because that was deemed to be the  
5 value of the painting in 2000?

6

7 MASON: Correct (inaudible)

8

9 J: Where does that come from?

10

11 MASON: I think it was an appraisal which was done, um, prior to the painting being  
12 turned over to the Italian government, and that was in 2001.

13

14 J: I think - I think those are my, uh, preliminary questions. Um, Mr. Salinger, to your  
15 motion.

16

17 SALINGER: Thank you, Your Honor.

18

19 J: You - you also understand that this has been referred to me, the full report and  
20 recommendation. You have the right - I'll just -just put this out there. You have  
21 the, uh - or you have two rights. You have - you have many more rights than the  
22 two that I've mentioned (inaudible) here. If you want, you also have the right to  
23 have this matter - for me to exercise jurisdiction, but there'd have to be consent of  
24 both parties. Uh, and short of the - that would deal with the entire matter. And  
25 short of that, you also have the - the right to jointly, uh, agree, uh, for me to have

1 jurisdiction over this particular question without the remaining case, if you will, uh,  
2 uh, being under my jurisdiction. And if you desire to exercise mutually either one  
3 of those, (inaudible) approaches here, then you should be in touch with the, uh, the  
4 Clerk's Office. But in the meantime, at this particular point, it's Judge Ponsor's  
5 case, and I've just been asked to do the Court recommendation. Mr. Salinger?

6

7 SALINGER: Thank you, Your Honor. As you already know, it's our position that the  
8 claims in this case are time barred. The, uh, overview is that these claims, uh,  
9 whether they are stylized as contract claims or court claims or otherwise, really are  
10 all breach of warranty claims, which accrued at time of the sale of this painting in  
11 1955. And the simplest way to deal with this, Your Honor, is you do not even need  
12 to reach application of the discovery rule. If you were, nonetheless, to consider the  
13 discovery rule, however, um, it is now clear from the second amended complaint  
14 that the plaintiff had adequate notice, uh, that there may be a claim here as of  
15 January of 1966, almost 40 years ago. Deliberately did nothing, uh, besides to keep  
16 quiet in hopes that the Italian government would just go away. Um, and then, uh,  
17 40 years later, almost 50 years after the sale of the painting, now brings this claim -  
18 uh, these claims. They are barred by that statute of limitations.

19

20 Uh, Your Honor, there are, uh, a few authorities that I - I'd like to discuss. I've  
21 already shared a copy of these, uh, with Mr. Mason, and with your permission I'd  
22 like to hand up a few items that -

23

24 J: OK.

25

1 SALINGER: (inaudible) people (inaudible) to have it at hand. And I'll just first tell you  
2 what's in here, and then I'll explain why I'm handing it to you. The top piece is  
3 cited in our brief around Page 13, and it is the one case in this district, uh, on  
4 similar facts regarding the, uh, timing, uh, for claims of this kind regarding the  
5 provenance of a painting to be brought. The second item is the first -  
6

7 J: (inaudible) the Wilson?

8

9 SALINGER: *Wilson vs. Hammer Holdings*, that's right. So first, you have the District  
10 Court decision, then you have the First Circuit decision on appeal. The third item  
11 is a UCC statute of limitations that's discussed in this case. Uh, the fourth item is a  
12 1989 Supreme Judicial Court decision, (inaudible) Spray, which deals with the  
13 same UCC statute of limitations. Uh, 1955 was actually a few years before the  
14 UCC was adopted in Massachusetts, and so it technically does not apply. And so  
15 the last two items are common law cases predating the UCC, which make the same  
16 point.

17

18 And the point, uh, made in all of this authority, Your Honor, which is alluded to in  
19 our 45 (sp?) I'd like to develop a little more fully this afternoon, is that claims for  
20 breach of contract, including claims, as in this case, for breach of warranty -  
21 remember, attached to the second amended complaint is this bill of sale, and a big  
22 part of the plaintiff's theories is that Knoedler, back in 1955, it said that it  
23 warranted and would defend the, uh, validity of the title of the painting. So this is,  
24 at its essence, a breach of warranty case.

25

1 Breaches of warranty, those causes of action, Your Honor, uh, all of these cases tell  
2 us, accrue at the time of breach, regardless of whether the aggrieved party had a  
3 knowledge of the breach at that time. Uh, that's what was held in Hammer  
4 Holdings, that's what this UCC statute of limitations expressly states. And for the  
5 purposes of this case, what's actually controlling is that was a common law prior to  
6 adoption of the UCC. That was the common law in Massachusetts in 1955. And  
7 both the, uh, Boston Towboat Case and the Perkins Whaling Case, uh, make clear  
8 that a breach of warranty claim accrues at the time of sale. It does not accrue later  
9 at the time that a claim is discovered. It does not accrue at the time the damage  
10 occurs. Rather, it accrues at the time that there is sale of property, uh, even if it is  
11 later on that some question regarding the validity of the title arises.

12

13 The other thing that these cases establish, Your Honor, is that a - a plaintiff in the  
14 position of the museum, in this case, cannot abate this fact, the accrual of a breach  
15 of warranty claim by stylizing claims that sound as if they are in tort. Uh, these  
16 cases, including the First Circuit's decision in Hammer Holdings, which the  
17 Supreme Judicial Court expressly agreed with, and the subsequent Bay State Case,  
18 which is why I've handed that up, Your Honor, uh those cases hold that, uh, among  
19 other things, there cannot be a tort claim for purely economic loss of this kind. And  
20 in any case, if somebody brings something that sounds like it's a claim in  
21 negligence, but it really involves a claim that you sold me something, you claimed  
22 you had title to it and could convey it and you were wrong, no matter how you  
23 stylize the complaint, for purposes of applying the statute of limitations, all of those  
24 claims must be treated as a breach of warranty claim. And for all of those claims,

1 there is no discovery rule, and the cause of action accrues at the time of sale. That  
2 was 1955.

3

4 Even if it could be shown - and there's the possibility of this on the face of the bill  
5 of sale - even if it could be shown that this - that this contract was made under seal,  
6 the longest possible limitations period is 20 years. If the cause of action accrued in  
7 1955, then the claim needed to be brought by 1975. We're a few decades too late.

8 Now the bulk of our - our brief, as you know, uh, deals with the even more  
9 generous reading, which would be an erroneous reading, but the even more  
10 generous, to the plaintiff, reading of the law, the possibility that, uh, discovery rule  
11 could apply.

12

13 J: Well, let - let me just say, I mean why - you're - you're arguing this - this point  
14 now, but if it's so obvious in terms of, uh, I mean - the - the complaint here, and  
15 I've read all the various, you know, the various (inaudible), and there's certainly a  
16 breach of implied warranty, there's breach of contract, fraud and deceit, negligent  
17 misrepresentation, innocent misrepresentation, implied, you know, breach of, uh -  
18 implied covenant of good and fair dealing. You're now saying, well, for the first  
19 time that this is - has nothing to do with being a contract case, this is a warranty  
20 case. And if it was so obvious, why are you bringing this up kind of later in the  
21 process? Uh, why wouldn't this -

22

23 SALINGER: We -

24

25 J: - have not been as obvious to you when you wrote your motion?

1

2 SALINGER: Your Honor, we - we should have made it clearer in our papers earlier, and

3 I apologize for not doing so. Frankly, we looked at the, uh, age of the sale,

4 predating UCC. We looked at all of the case law arising under the UCC and

5 realized that it - it did not directly govern this case. And we also realized that, um,

6 if a discovery rule were applied and the case still went away, uh, then in a sense it

7 didn't matter, uh, if we could make the argument that the cause of action, uh, was a

8 contract claim that accrued at the time, uh, of the sale in 1955.

9

10 J: But if you - if you had to look at the, uh - you know, at the bill of sale, now that  
11 you're raising this, is that, um, you're selling the - a painting, representing it being  
12 something, and um, and you're doing that in consideration of \$5,000. That seems  
13 to be the contract.

14

15 SALINGER: Yes, Your Honor.

16

17 J: OK. Then in addition to that, OK, it says - perhaps - and I'm just looking -  
18 looking at this through the - with the new viewpoint that you're raising, and is that  
19 the grantor is hereby covenant. Um, that it has good right to sell it and that it will  
20 warrant and defend the sale (inaudible). So maybe there's a warranty aspect to it as  
21 well. It doesn't mean - it doesn't necessarily mean that there's not a contract as  
22 well.

23

1 SALINGER: Oh, Your Honor, whether it's stylized as a - as a warranty claim or a  
2 contract claim, we - we agree. A warranty cl - claim would be a form of a contract  
3 claim, whether it's an ex - explicit -

4

5 J: No, but I'm saying if - if you - if you didn't even have the warranty language here,  
6 isn't there a contract claim that - that remains?

7

8 SALINGER: And that contract claim accrued in 1955.

9

10 J: No, I understand - well - well, no. Now you're saying something different. Now  
11 I'm just trying to follow your argument. Your argument, I thought you were  
12 saying, had to do with warranty claims. If everything is a breach of warranty claim,  
13 then you're going through that there's no way - unless your argument goes both to  
14 contract claims and warranty claims, but that there's no way for the museum to get  
15 out from under the 1955 date - that's the accrual date - that discovery doesn't even  
16 apply to that. And that the, uh - that it runs - it's accrued at that time, and - and  
17 the statute of limitations starts to run at that particular point. And you're doing that  
18 to get out from any applicability of the discovery rule. Wasn't that your argument?

19

20 SALINGER: Yes. The only - the only quibble, Your Honor, is I was not trying to  
21 distinguish warranty claim from contract claim. Um, they're - they're both  
22 contract claims, so they would both be treated the same for purposes of accrual.

23

24 J: But - but aren't - doesn't the discovery rule also apply not only to torts but to  
25 contracts?

1

2 SALINGER: The - the nature of the contract claim here, Your Honor, though, is a breach  
3 of warranty claim. The - the contract, uh, claim is that, uh, Knoedler said that it  
4 had good title to this painting. Uh, that was the representation, and that was - was  
5 incorrect, uh, claims the plaintiff. And in being incorrect, that's a breach of  
6 contract. Well, Your Honor, that's - that's just another way of phrasing a warranty  
7 claim. Um, Your Honor, by the way, we would, if - if it's of assistance to the  
8 Court, be happy to reduce, um, this - this new gloss, shall we say, on Hammer  
9 Holdings to - to writing after oral argument or -

10

11 J: I'll - I'll - yeah, I'll - I'll consider that. But um - OK. But you're going to your  
12 next argument, which is assuming that the - that the discovery rule applies, so let's  
13 go there. You've indicated that the discovery would have occurred in 1966?

14

15 SALINGER: Correct, Your Honor.

16

17 J: When the claim was being made by the Italian, uh, government?

18

19 SALINGER: Correct, Your Honor.

20

21 J: OK, go ahead.

22

23 SALINGER: It was in January of 1966 that the museums first received a letter from the  
24 Italian government, uh, saying -

25

1 J: Well actually, let me interrupt you. I'm sorry. One moment.

2

3 SALINGER: Sure.

4

5 J: And it - it relates to what you - where you -the time period that you're talking  
6 about, which is - if I were to assume that this was under seal, OK - it says it's  
7 under seal. Assume that for the moment. Then for a contract claim, it's a 20-year  
8 statute of limitations, is that correct?

9

10 SALINGER: Yes, Your Honor.

11

12 J: Does that also apply to the warranty?

13

14 SALINGER: We believe it would, Your Honor.

15

16 J: OK. Go ahead.

17

18 SALINGER: And so -

19

20 J: So 1966 arises, you have a letter, and we're in this 20-year period. Go ahead.

21

22 SALINGER: If the claim accrued, as we say it did, in 1955, we're in the -

23

24 J: Correct.

25

1 SALINGER: - correct of a 20-year period.

2

3 J: Correct.

4

5 SALINGER: Our altern - alternative argument is that even if there were discovery rule  
6 that hold the running of the statute until adequate discovery of the possibility of a  
7 claim, that moment occurred in January of 1966. And so if the - the limitations  
8 period has not been running prior to then, it started to run then, and of course, uh,  
9 under our theory, it ran out no later than January of 1986, still long before this suit  
10 was brought. Um, in January of 1966 -

11

12 J: All right, January of '86. 20 years.

13

14 SALINGER: 20 years. That's the longest possible and most generous reading to the  
15 plaintiff, (inaudible).

16

17 J: OK.

18

19 SALINGER: This January of 1966 letter requested voluntary restitution of the painting.  
20 Um, the Italians said it's ours, give it back, you don't have good title to it.

21

22 J: Correct.

23

24 SALINGER: And uh, the museums understood right away that they had an issue with  
25 Knoedler, because the first thing they did a few things after receiving the letter -

1 and now we're moving on to Exhibit C, to the second amended complaint - uh, the  
2 museums wrote Knoedler and specifically asked Knoedler to keep this whole  
3 question quiet. They knew they had a problem. They hoped it would go away.  
4 There were some back and forth, some questions that Mr. Mason tries to make  
5 much of in his opposition, questions about, well, how do we know that the painting  
6 the Italian government is referring to is really this painting.

7

8 J: Wait, who - who says this?

9

10 SALINGER: Uh, this - these were, uh, in the correspondence attached at Exhibits C, D,  
11 and E to the second amended complaint, Your Honor.

12

13 J: (inaudible) a second. Right, but C is that original letter, and - and uh, D is - is, uh  
14 - I (inaudible) these. D is the letter, uh, that files - was filed shortly on the heels of  
15 that to Knoedler.

16

17 SALINGER: And E is a response from Knoedler to the museum.

18

19 J: Well, E, I actually have two - E, I have, uh, a copy of another letter from the  
20 museum to Knoedler. And F is from - is the response, the very nice response.

21

22 SALINGER: In - in the form that this was served on me, Your Honor, and we seem to be  
23 looking at different compilations, um, Exhibit C is a January 17, 1966 letter to  
24 Knoedler from the museum -

25

1 J: Now what - what are you looking at?

2

3 SALINGER: The second amended complaint.

4

5 J: All right, well let's get - let's get that on board here, because we need to know  
6 exactly what I have. And if you could look at your complaint. The complaint in  
7 Court, OK, the original complaint in Court, A is the bill of sale. And this is - this  
8 is what I'll be using, OK? A is the bill of sale. Uh, B is a loose (inaudible),  
9 November 1, 1966. This is -

10

11 SALINGER: Actually -

12

13 MASON: No, no. January 11<sup>th</sup>.

14

15 SALINGER: January 11<sup>th</sup>.

16

17 J: That's right. We're in Europe there. January 11', 1966. This is the letter that, um,  
18 that I have. Then what I have - and this is where something may have gone awry -  
19 is I have - C is the trans - I have Exhibit C -just telling you what's in here. C is  
20 the translation of that letter. OK, let's just move along and you can always tell me  
21 - D is the January 17' letter from Mr. Robinson, Professor Robinson to, uh, Mr., uh  
22 - well, it says here Coe" - oh, that's his first name. Uh, to Mr. Kerr, and that's -  
23 that's what I have as D. E is a - oh, this is what happened, OK. E is the February  
24 8<sup>th</sup> letter, and F - the February 8<sup>th</sup> letter from Mr. Robinson to, uh, Mr. Ripperger  
25 (sp?) of Knoedler. F, I have a February 9<sup>th</sup> letter -

1

2 SALINGER: And that should be it (inaudible) -

3

4 J: - to Mr. Robinson from Mr. Ripperger. And then part of this - that's F. And - and  
5 part of F, with (inaudible), is a May 24<sup>th</sup> letter from Mr. Ripperger back to Mr.  
6 Robinson. That's what I have. Now am I - putting aside mislabeled, do I have  
7 every - all the letters that are there?

8

9 SALINGER: Yes.

10

11 J: OK, so this - OK, go ahead.

12

13 SALINGER: I will work off of your tabs. Your tabs don't quite match the text of the  
14 second amended complaint itself, but let's use the references on your tabs.

15

16 J: OK, go ahead.

17

18 SALINGER: Um, and so let me just back up a little bit, because I was inadvertently  
19 confusing you since I had different tabs. Urn, tab D is the January 17<sup>th</sup> letter -

20

21 J: Correct.

22

23 SALINGER: - and so that was just a few days after the museums - uh, the museum heard  
24 from the Italian government. The museum clearly knew that it had a - an issue  
25 with Knoedler because it immediately wrote Knoedler and asked Knoedler to keep

1       this whole question quiet. February 8'', your tab E, Your Honor, at this point the  
2       museum, uh, acknowledges in writing to Old - Knoedler that the similarity is  
3       obvious, meaning the similarity between the painting that the museum has, this  
4       Bassano, and the Bassano that the Italian government says it wants back.

5

6       J:     Now let me just - sticking with this letter, I - I'm not being asked to look at this,  
7       OK, and I don't know if it exists, but wouldn't it be informative to know what it  
8       was that, um, Mr. Ripperger had, uh, drafted, uh, as a letter to Dr. - to Dr., uh, uh,  
9       Becheruci of - of the, uh, Uffizi Museum? Because it's mentioned here and then  
10      it's mentioned, uh, again, uh, in the February 9' letter, that he said, um, how lucky  
11      that I had not sent off my letter to Dr. Becheruci. I don't have that, so I don't know  
12      what's going on there. You don't believe that that's necessary?

13

14      SALINGER: No. No, Your Honor. Though I, of course, share your curiosity about it,  
15      uh, the Court does not need to make any findings about those facts in order to  
16      decide this issue. As we discuss in our brief, um, if the discovery rule applied here,  
17      uh the museum did not have to understand or know all of the details of an injury or  
18      all of the details of a possible cause of action in order for the statute of limitations  
19      to begin to run. It merely needed to know enough to realize it had a potential claim  
20      that it had better investigate. And here, what you do have in front of your - you,  
21      Your Honor, is sufficient to show, uh, that the museum was in that position  
22      because, uh, in fact, the first thing that it did is it started to investigate. It wrote  
23      Knoedler and asked Knoedler to provide more information. Um, so we know on  
24      the face of this correspondence, as incorporated into the plaintiffs own second  
25      amended complaint, that the museum knew enough that - to start investigating.

1

2 And uh, the - the point I was making before we got a little bollocked up on the  
3 tabs, was that even at this early stage in February of 1966, it had become obvious,  
4 first to the museum and then Knoedler wrote back confirming this, uh, in the - in  
5 the next letter in this sequence, Your Honor, your tab F, um, Knoedler confirms  
6 that there seems to be little doubt that they are one and the same painting. So again,  
7 it was obvious to the museum, which wrote it down, and to Knoedler, which  
8 confirmed it in writing back to the museum, that the painting sold by Knoedler to  
9 the museum was the very painting that the Italian government was seeking back.

10

11 J: I think - I think that you're picking and choosing a bit here. I mean I - it doesn't  
12 totally undermine the argument that - that the - that the museum was aware that  
13 there was a serious problem here. I - I'm - I'm in agreement on that. Uh, but I  
14 don't think that, uh, at this moment in time that you could say that Knoedler is  
15 responding, um, in - in quite the, uh, pure way that - that you're indicating, that  
16 indeed it is. I mean, that both, uh, this - there are still areas of confusion in  
17 addition to the official size, and then it goes - then it goes on with that. So there  
18 are certain things that Knoedler is telling the museum at this moment in time, um,  
19 uh, that is, um - well - so they speak for themselves, these letters, don't they.  
20 Everybody seems to claim that, but there's other things that are said here that are  
21 simply it is that you need to return it. OK? And uh, we'll send you your \$5,000 or  
22 whatever we (inaudible) - what was the value of the (inaudible) painting? Does  
23 anybody have an idea of what the value of the painting was in '66 as distinct from  
24 1955?

25

1 SALINGER: I'm not aware that there had been an appraisal done at that point in time.

2

3 J: OK. All right, go ahead.

4

5 SALINGER: Uh, though the Hammer Holdings case certainly suggests that if there were  
6 a live claim, the relevant value would be the value at time of sale, but we're not  
7 going to reach that, I submit -

8

9 J: OK.

10

11 SALINGER: - because of the limitations problem.

12

13 J: OK, go ahead.

14

15 SALINGER: Um, and - and I should be clear, Your Honor, your point is well taken about  
16 what's in the letter. So I should be clear about what our position is so I don't take  
17 on more of a burden of proof than we have. All we need to do in order to show that  
18 the - this claim - that these claims are time barred is show that the museums knew,  
19 uh, that they had a big problem that they needed to investigate. Once -

20

21 J: Well, at this moment in time - and I may be wrong, you know, maybe Mr. Mason  
22 can tell me otherwise - is I'm not sure that Mr. Mason would argue with you, uh,  
23 that, uh - he'll argue with your first point, is the accrual date as being (inaudible) -  
24 well, he won't necessarily argue with your - the accrual date being 1955. He will,  
25 uh - but at least you say that the - the accrual date should be, put it this way, the

1       1966 time. I think that - that Mr. Mason may be acknowledging the '66 date as the  
2       accrual date, putting aside the 93A, but he seems to be arguing other things having  
3       to do with the - the running of the statute of limitations, uh, since that time. Let me  
4       just ask Mr. Mason. Uh, you've had an opportunity to - to address this in a lot  
5       more detail, but am I -

6

7       MASON: Certainly -

8

9       J:       - am I on - on the right track here -

10

11      MASON: Absolutely.

12

13      J:       - in understanding what your argument is -

14

15      MASON: Yes.

16

17      J:       - an acknowledgement of being aware that the, uh - that knowing or - or that there  
18       was a significant problem with this painting at that moment in time?

19

20      MASON: There's no question.

21

22      J:       And you're not - you're not seeking an accrual date of 2000, are you?

23

24      MASON: No, the -

25

1 J: Do you?

2

3 MASON: No, the argument is that the doctrines of (inaudible).

4

5 J: OK, so that - that's what I - that's what I thought. So I - I don't think you're  
6 going to get much of an argument with Mr. Mason that, uh - at least  
7 acknowledging that the, uh - that the cause of action accrued at that time. He  
8 doesn't accept your 1955 date, but he's accepting the 1966 date. OK, so really, it -  
9 it's getting to these arguments that - and it's perhaps for that reason that I'm saying  
10 that we need to read some of these letters in a - in a - in a fuller way to, uh, get at  
11 this - the issue of, uh, I think it was, uh, equitable - you know, the equities, in  
12 essence, uh, of having the statute. Go ahead.

13

14 SALINGER: Well, the reason why that's incorrect, Your Honor, why the museum's  
15 position is incorrect, um, is because of the nature of the discovery rule itself. Um,  
16 as I suggested earlier, if it applied, one does not need to discover all the details of  
17 one's claim in order to know that there's a potential claim that you'd better  
18 investigate. That's all that's required. And if you know that much, uh, then there's  
19 no equitable tolling within the normal construct of the discovery rule. Um, the dis  
20 - the, uh, equitable tolling concept only applies, as we've spelled it in our brief,  
21 um, if there's a situation, uh, where the facts of a claim were inherently  
22 unknowable, that there's nothing that a plaintiff could have done to learn about the  
23 claim. Uh, but that's not the case here. Uh, the museum could have investigated.  
24 It could have pressed the Italian government, uh, for the information that it - it

1       eventually did receive from that very source in, uh, 2000. It could have pressed for  
2       that information in 1966.

3

4 J: Well, did - did it not? I mean I - again, I'd have to go and look at the - at the  
5       particular letters, but I was under the impression from the letters, or at least, uh,  
6       inferences from some of the letters or the facts that (inaudible) that during the  
7       course of that year, at some point there was communication - some of it from the  
8       museum itself, and some of it from, uh, Knoedler - to the Italian government, uh,  
9       asking for certain, uh, follow-up information, uh, about the provenance of this  
10      particular, uh, painting. And then at some point, it seemed to have disappeared into  
11      the ether, uh, after late 1966, if I have my - if I have my dates back. So it wasn't as  
12      if the museum wasn't doing anything. They were, uh - uh, the museum, and  
13      indeed, I think Knoedler, if I'm not mistaken, had, uh - let's see.

14

15     So let me just make some references here maybe this will help. There's, uh, in the  
16      February 9<sup>th</sup> letter from Mr. Ripperger to, uh, the museum, he says something along  
17      the lines, the next step would be to write to the firm in Lucerne from which we  
18      acquired the picture and I have know done so -so - so Knoedler is following  
19      through on this. And then at some particular, uh - and then he attaches other -  
20      other documents here. And then in the May 24<sup>th</sup> letter from Mr. Ripperger to, uh, to  
21      the museum, um, he talks about a May 23' letter. I don't have that. Uh, I - I don't  
22      have that letter, but I believe elsewhere there are allegations that - that maybe this  
23      is in some of the documents in the original complaint. I don't know. (inaudible).

24

25 SALINGER: Your Honor, there was some limited additional correspondence -

1

2 J: (inaudible). In the original complaint, right?

3

4 SALINGER: Well, there was nothing attached to the original complaint (inaudible).

5

6 J: No, no. No, uh, attached to - maybe this is in the opposition, (inaudible) plaintiff.

7 Now actually, let me get - I can get back to this. (inaudible) let me ask, this is your  
8 opposition. I'm going to ask -

9

10 SALINGER: Sure.

11

12 J: - (inaudible) Mr. Mason. This gets back to a earlier question. You've attached  
13 certain things in your opposition, OK? There's the September 2, 1966 letter.  
14 September 14, 1966 letter. Oh, there is that May 25' letter. I guess that's - that's  
15 the letter that was referred to that I - that I was missing in the complaint itself.

16 There's a letter from the director general of antiquities and fine arts in Italian on  
17 July 25", and a letter September 21<sup>s</sup> from the museum to Italy. Now - so those are  
18 not contained in the - are those letters referenced in the complaint itself?

19

20 MASON: I believe that all of those are, in addition to some others. Uh, but there is -

21

22 J: They're not attached to the complaint?

23

24 MASON: No. No. Uh, they reference the correspondence.

25

1 J: Well, this gets back to an earlier question. I mean, and I haven't drawn a chart  
2 here, but if I'm being asked to make a judgment on the pleadings, these are not in  
3 the pleadings.

4

5 MASON: To the extent that a - for example, the September 2, 1966 correspondence to  
6 Knoedler is referred to in the pleadings, then the document itself may be considered  
7 by the Court, and I believe that -

8

9 J: I understand that. But let me just say this. If I go through the pleadings, do you  
10 happen to know, for example, whether or not the September 21, 1966 letter, which  
11 is your Exhibit F -

12

13 MASON: Is, uh -

14

15 J: - is in fact referred to in your pleadings?

16

17 MASON: Yes, in paragraph that's (inaudible) on the - we state that there is a (inaudible)  
18 9/19/66, September 21, '66 the museum to Knoedler, and the museum to the Italian  
19 government exchanged correspondence relative to, uh, the complaint.

20

21 J: I understand that, but -

22

23 MASON: That - that is the reference to the September 21" correspondence.

24

25 J: And what - what was the beginning? That was paragraph 15?

1

2 MASON: That's correct.

3

4 J: Right, but said - there's a starting date?

5

6 MASON: Uh, February 9<sup>h</sup>.

7

8 J: And do I have the February 9' letter?

9

10 MASON: Not attached to the, uh, our opposition because we didn't feel that it lended  
11 anything (multiple conversations; inaudible) -

12

13 J: Right.

14

15 MASON: - what correspondence that you do not have.

16

17 J: That's right.

18

19 MASON: That is correct.

20

21 J: OK. And with - with respect to these other, um - oh, I see the May 25''. That's  
22 another corr - these are - what about this September 14, 1966 letter, Exhibit B?

23

24 MASON: I don't believe that that is specifically referred to in - on our complaint.

25 Rather, we would assert that it's also in the category of during that period of time,

1 there was correspondence which was exchanged, but there's no specific delineation  
2 of that particular correspondence (multiple conversations; inaudible) -  
3

4 J: I thought that the correspondence was between the museum and the Italian  
5 government?

6

7 MASON: The September 14' was, um, at Knoedler's -

8

9 J: No, no, no, I know what September - the allegation of complaint.

10

11 MASON: Uh, the paragraph 15 that I was referring to?

12

13 J: Yeah.

14

15 MASON: That simply refers to correspondence which was exchanged during that period  
16 of time.

17

18 J: Oh, it includes Knoedler?

19

20 MASON: That's correct.

21

22 J: All right. And you're wanting the - you're saying that I should - those references  
23 now, is I should make -

24

25 MASON: Subsume them.

1

2 J: Subsume them? And it still remains under Rule 12?

3

4 MASON: That is correct.

5

6 J: All right. Go ahead. All right. Go ahead.

7

8 SALINGER: Under the standard, legal standard as we have pointed out in our brief, is  
9 that it's the plaintiff that has the burden to plead specific facts sufficient to support  
10 tolling of the statute of limitations. And the plaintiff has not done so here. The  
11 plaintiff knew it had a problem, it knew it had a potential claim. Uh, the plaintiff at  
12 the outset asked Knoedler to keep it quiet. There was some further exchange of  
13 correspondence. Um, after a few months, um, a letter that we had attached to our  
14 previous answer, um, that's not attached to the second amended complaint, this  
15 April 22" letter, Knoedler confirms that as the museum had requested, Knoedler  
16 was continuing to play a very quiet game. The museum - museum was not  
17 pressing this, because it didn't want to. The museum has not met its pleading  
18 burden and cannot meet its pleading burden of showing that, having been put on  
19 notice by the Italian government that there was a challenge to the title, uh, in this  
20 painting, that it could not have, uh, diligently pursued the possibility of a claim  
21 against Knoedler at any time after 1966.

22

23 Um, the fraudulent con - concealment, uh, prong of this tolling argument fares no  
24 better, Your Honor. As a matter of law, uh, the museum has the burden of proving  
25 that, uh two conditions are met. First that Knoedler engaged in fraud or deliberate

1 concealment of material facts. And second, um, that the plaintiff must have failed  
2 to discover these facts within the normal limitations period. Well, as I understand  
3 the museum's theory, the only thing that they're claiming is that - and they seem to  
4 be claiming that this was negligently withheld. That's not fraud. They're saying  
5 that Knoedler should have realized that it had not acquired adequate title to this  
6 painting, and that if only Knoedler had figured that out before selling the painting  
7 to the museum, this wouldn't have happened. Urn, that does not make out tolling  
8 for fraudulent concealment, because there's no actual allegation of fraud. There  
9 would have to be specific facts laid out demonstrating that Knoedler knew that it  
10 didn't have good title to this painting. None of that is alleged anywhere in the  
11 complaint with specificity, Your Honor.

12  
13 And secondly, um, the museum would have to meet its burden of being able to - to  
14 prove, through specific pled - specifically pled facts that it couldn't have  
15 discovered that. Well, to the contrary, again, we know that as of January, 1966, if  
16 there had been any concealment by Knoedler - again, no allegations supporting that  
17 - uh, the museum learned of it in January of 1966 when the Italian government  
18 came calling.

19  
20 J: Let me ask a question, with respect. Your entire argument, uh, in terms of this  
21 statute of limitations, uh, assumes no difference, if you will - really, very much of  
22 what you said in the beginning of your argument - uh, between the various claims  
23 here. Urn, so that the accrual date, as far as you're concerned for each one of these  
24 claims, goes back at least to 1955, and at best to 1966. OK? But you draw no  
25 distinctions between the various claims. You don't have a motion to dismiss the

1       stated claim, for example, on any particular, uh, ground, although you're arguing in  
2       the context of that, for example, that the fraud claim might not - is it Rule 9 - it's  
3       not specific enough with regard to what the fraud is, um, mainly that Knoedler  
4       knew back in 19 - 1955 that it was not, uh, an owner in due course of the - of the  
5       painting. But that's not even alleged here. Um -

6

7       SALINGER: A little more broadly, Your Honor, as I understand the museum's position,  
8       the museum's position is - first of all, they agree with us with the exception of the  
9       Chapter 93A claim that we should probably speak about separately, that all of the  
10       claims, uh, are properly dealt with in the same manner in terms of accrual, and if  
11       the discovery rule applied, in terms of -

12

13       J:     No, I - I'm - I'm agreeing, but what I -

14

15       SALINGER: And - and the museum is arguing that the limitations period should be  
16       tolled with respect to all of the claims under a fraudulent concealment theory. And  
17       so their obligation to be able to allege facts with specificity is not limited to their  
18       count that - that may be labeled (inaudible) -

19

20       J:     I - I'm making a somewhat different point. I understand your point having to do  
21       with fraudulent concealment as it relates to tolling. Um, and uh, I'm not clear  
22       either, as to what the fraudulent concealment was from 1966 onward, if - if you  
23       will, OK, which is accepting, for purposes here, 1966 being the date from which to  
24       measure the statute of limitations, and that it needs to be tolled because of  
25       fraudulent concealment after that. I'm not sure what the fraudulent concealment is.

1 Unless somehow there's an allegation, and there's not, that the fraudulent  
2 concealment in a sense is somehow related to or - or that there's fraud, as alleged  
3 in Count 3, independent of fraudulent concealment, that says that the museum knew  
4 in 1955, the museum, rather than - not the museum, the, uh, Knoedler knew in  
5 1955 that it didn't have proper ownership of- of this painting and sold it anyway.

6 That would be the fraud, I believe. OK?

7

8 SALINGER: I think you're correct. That is not alleged.

9

10 J: And - and it's not alleged, although there's a fraud count here. I don't know what  
11 else the fraud would be, other than that. And all I'm saying is you're not making  
12 any motion here to dismiss because of the failure to be specific as to what the fraud  
13 count is all about. You're content, for purposes here, to, uh, argue this on a stat -  
14 on statute of limitations only -

15

16 SALINGER: Yes.

17

18 J: Is that correct?

19

20 SALINGER: Yes, Your Honor.

21

22 J: OK.

23

24 SALINGER: The Chapter 93A claim cannot be used to get around the museum's statute  
25 of limitations problems. Under Mr. Mason's theory, um, if I have a potential claim

1 for money damages against somebody, I can wait as long as I want - ten years, 20  
2 years, in this case 50 years - until I actually ask them, perhaps with second time, to  
3 pay me the money, my Chapter 93A claim does not accrue. That's - that's as I  
4 understand (multiple conversations; inaudible) -

5

6 J: Yeah, I understand. I'll - I'll ask Mr. Mason a little bit more about that. What I  
7 understood him to say earlier was that 93A did not exist in 1966, and somehow he  
8 - he's trying to figure out a way to make it applicable, and uh, therefore is  
9 (inaudible) the letter. But I think what your argument is that the 93A letter itself,  
10 putting aside everything else, could not be written, um, more than six years - I  
11 forget, six years is the statute of limitations on that?

12

13 SALINGER: Four years.

14

15 MASON: Four years.

16

17 J: Statute of limitations on 93A, uh, after the action accrued. And you are going right  
18 back to these original dates, either 1955 or 1966?

19

20 SALINGER: That's correct.

21

22 J: That's your argument?

23

24 SALINGER: Mr. Mason and I agree that, um, Chapter 93A couldn't apply to the events  
25 back then because it didn't exist, but you can't wait many years and - and then say

1 I've got a new claim because I'm now making a demand. That - that's not how  
2 93A works.

3

4 J: What - what about, uh - what about Mr. Mason's claim, and in the context of  
5 equitable tolling, of the museum's equitable tolling argument, that this whole  
6 approach to the Italian government was done with Knoedler's, um, uh, concurrence,  
7 and that it's inequitable, if you will, for Knoedler to now turn around and say, oh  
8 yes, well we may have done that, uh, but um, it's still too late, you needed to sue  
9 us?

10

11 SALINGER: Well, Your Honor, this was not a situation where - first of all, it's not even  
12 alleged that this - any delay was at the instigation of Knoedler. Instead, the  
13 complaint makes clear it was the museum in its first letter, when it first brought this  
14 problem to Knoedler's attention, that said let's try to keep this quiet. So Knoedler  
15 was - according to the face of the complaint. And what the plaintiff has attached to  
16 the complaint, Knoedler (inaudible) -

17

18 J: (inaudible) I don't - I - if I had to - my reading of that first letter? I don't read it  
19 quite the same way that you read it. Uh, I - I read it as if let's not get the whole  
20 world upset at this moment in time. You know, Springfield, you - you know, let's  
21 - let's investigate this. I - I'm not sure it's as one-sided as I'm sure you'll agree.  
22 Um, but - but in any case, I mean that gets to sort of inferences and interpretations  
23 of - of these documents, which are, um - speak for themselves.

24

25 SALINGER: So let me -

1

2 J: - until somebody says they speak for them - for the letters. But go ahead.

3

4 SALINGER: So let me get to my - my broader legal response, Your Honor. It goes back  
5 to the discussion we had earlier about what is meant by the discovery rule and how  
6 much knowledge one needs to have before you're on notice of having the claim.

7 The doctrine of equitable tolling classically comes up when the defendant, uh, does  
8 something, uh, to prevent the plaintiff from realizing it has a potential claim. Uh,  
9 either by concealing key information without which he wouldn't possibly know to  
10 investigate, or by somehow pressuring the plaintiff not to do something, or - or in  
11 rare instances, holding up quite affirmatively, you know, don't worry, I'll hold you  
12 harmless if you don't sue me now instead - and then it becomes more of really an  
13 estoppel point. None of those variants of equitable tolling doctrine apply here.

14

15 The museum knew that it had a problem. It knew that it had a potential claim. It  
16 immediately reached out to Knoedler and said, hey, what - what are we going to do  
17 about this. Uh, there is no allegation. Urn, and the First Circuit has emphasized  
18 that there would have to be specific allegations of this kind, conclusory allegations  
19 of inability, uh, to - to learn what is going on, are insufficient to - to meet the  
20 pleading burdens here. And uh, there is no allegation that Knoedler has done - had  
21 done anything affirmatively to tell the museums, uh, no, don't move forward on  
22 this, uh, and we'll hold you harmless, or that Knoedler had done anything to make  
23 it impossible for the museum to investigate its claim beginning at least in 1966.

24

1 J: Well, you know, it - it - what's interesting about this case is the fact that you really  
2 have three parties, if you will - um, the Italian government, Knoedler, and the  
3 museum. And this whole notion of discovery and, uh, tolling very often has to do  
4 with a dispute, if a dispute arose at some point, between the museum and the Italian  
5 government. What - what's different about this case is the, uh - is the fact that the  
6 dispute is - is between the museum and the dealer here, and that the dealer  
7 participated to a degree - and maybe that's, uh, a question of fact - but participated  
8 to a degree in the decision and in the approach - this is the inferences that I'm  
9 drawing from these correspondence - and an approach to be taken vis-a-vis the  
10 Italian government.

11

12 And Knoedler wasn't standing by idly in this. Making certain suggestions, doing  
13 certain things, going back and forth. And um - and they may have been summaric  
14 to all of that. I mean look what happened as a result of this. As a result of the  
15 correspondence, the ensuing correspondence with the Italian government, the  
16 Italian government waited another 34 years or so before it - it put its act together.  
17 Now again, I don't have some of the other correspondence here, but I think with the  
18 later correspondence, which may not matter, but the later correspondence, it seems  
19 as if that includes a much more specific explanation on the part of the Italian  
20 government to some of the questions that had been raised by the museum and by  
21 Knoedler in 1966, name - you know, things having to do with - how do we even  
22 know this was in Warsaw, for example. And what about this dispute between - uh,  
23 in the book, somebody says, well, this painting was in the Uffizi Museum and then  
24 it was at another museum (inaudible). And if I - I don't know exactly where it was,  
25 but in reading the - a letter or some information from the Italian government in - in

1       2000 or thereabouts, there's a much more specific, uh, documentation, if you will,  
2       sh -giving proof that this was indeed in the embassy in Warsaw, and going on and  
3       on and on.

4

5       And I don't know how - how it got to Mrs. Peach's hands. I mean that is  
6       somewhat unclear here, but it took a long time. So in some ways, if you will, there  
7       is some merit to the inquiries, despite both - both Knoedler's and, uh, the museums  
8       says that this is probably most likely, uh, that this, um - this same painting that  
9       they're arguing - although I think at some point, and it - it made me curious, that  
10      there may be other similar paintings of different sizes that exist elsewhere. You  
11      know, maybe there's a theme here. But I - you know, something like that.

12

13      So there was this comparison, if you will, about a certain approach, uh, to take.  
14      And um, that indeed had - had some success. And uh, getting to this - sort of this  
15      - the estoppel aspect, as you put it, of, uh - of tolling, I mean in essence, isn't the  
16      doctrine of estoppel quite different than the doctrine of tolling? And is that not  
17      what the museum is arguing here, that assuming you're right, the museum is right  
18      on the discovery issue and the - at least the accrual date happening in 1966, and  
19      assuming that the museum is right on the issue of fraudulent concealment, OK, that  
20      there was no fraudulent concealment, and assuming that the museum is even right  
21      on the - on the tolling, because it - there wasn't anything done between, uh -  
22      between the two, which seems to fit into the tolling aspect, the tolling standard -  
23      um - you know, having to do with discovering something without due diligence.  
24      It's clearly they may well have - they knew or should have known that they - they  
25      had an action, possible action against, um - up against Knoedler.

1

2       But then - and if Knoedler had done nothing or if Knoedler had said you have to  
3       return this - they had done nothing other than, you know, receive letters, and all of  
4       this was done at the instigation, if you will, of the museum, in raising these  
5       questions and delaying and procrastinating vis-a-vis the Italian government, your  
6       case would be a much easier case. But once - once Knoedler participated, um, in  
7       this, and in some ways encouraged plaintiff to take - to take those certain kinds of  
8       steps, is not - is not Knoedler estopped from making its statute of limitations  
9       argument at this particular point, and why not?

10

11      SALINGER: No, Your Honor. There is no case law that says, uh, defendant is estopped  
12       from relying on a statute of limitations if the defendant has made some effort,  
13       which is what you're suggesting one could read here. Some effort to encourage the  
14       plaintiff not to sue you. That does not give rise to estoppel. The strong public  
15       policy underlying the statute of - statute of limitations, uh, exists for cases like this.  
16       Uh, people and - and institutions need to be able to settle their affairs. And  
17       decades old - 50 year-old claims need to be put to rest. Uh, if the museum -  
18

19      J:     But wasn't that a risk that Knoedler itself was taking at that very time. I mean the -  
20       the notion of estoppel, it may stop - estoppel is what - a statute of limitations, um,  
21       is estopped when a defendant made representations it knew or should have known  
22       would induce the plaintiff to put off bringing suit and the plaintiff did, in fact, uh,  
23       delay in reliance on those representations. Now granted, it's not a direct, but it's  
24       certainly an indirect. There's a certain benefit that Knoedler understood it was  
25       going to get - and that's why I asked. I don't know what the amount of that benefit

1 was because we don't know what the value of the painting was at that particular  
2 point, OK, and what the suit might be, OK? And that gets back to another point  
3 that you were making, that maybe it's only a (inaudible). But putting all of that  
4 aside, Knoedler's actions here, could they not be interpreted as helping to induce  
5 the plaintiff to put off making a claim against - against Knoedler as long as, uh,  
6 they were able to delay, uh, returning anything to the Italian government, and that  
7 Knoedler also took a risk in doing that, and um, has to - to pay for that risk at this  
8 particular point?

9

10 SALINGER: No, Your Honor, and at least a two part response.

11

12 J: OK.

13

14 SALINGER: Part one, there's no representation. Uh, what the museums say Knoedler  
15 did is Knoedler was asking questions. How do we know Knoedler was joint in the  
16 museum in asking? How do we know that - that this painting was stolen? How do  
17 we know it should be given back? There's no allegation in the second amended  
18 complaint of affirmative representations by Knoedler about some factual matter  
19 being relied upon by the museum in 1966. And that's the second part answer, Your  
20 Honor. Even if there were the - the only representations that were claimed to go on  
21 were during a limited period in 1966. Um, there - it is not the case, uh, that if - if I  
22 tried to discourage somebody from suing me for some period of time that that gives  
23 them a free pass and they can sue me in 50 years or sue my estate in 200 years. For  
24 all time, the statute of limitations just stops running.

25

1 There - there were no representations that tolled the statute from running here. But  
2 if there were, there's no allegation of any such representations being made after  
3 1966. And so if there was a tolling period, which there certainly was not, but  
4 hypothetically if there was, it - it ended sometime during this period of time in  
5 1966, because there was not any ongoing attempt by Knoedler to discourage the  
6 museums from doing what it - what they should have done, diligently investigating  
7 their potential claim. And so the statute of limitations, even if they had been tolled  
8 - again, they weren't - but are - let's say for argument, if there was tolling, it ended  
9 long, long ago, far more than 20 years ago. And the statute of limitations exist so  
10 that Your Honor or - or jurors at some point in the future, uh, don't need to be  
11 trying in 2004 to figure out what was going on in 1955 when this painting was  
12 purchased.

13  
14 J: OK, thank you very much.

15  
16 MASON: Good afternoon, Judge (inaudible), and thank you on behalf of our client for  
17 (inaudible) in a very interesting and difficult case. I think that you, uh, very  
18 sophisticatedly understanding as to what the museum's allegations are. The  
19 museum's allegations are not simply that there was an agreement which was  
20 entered into in 1955, that carried with it the warranty. The museum's case is about  
21 what happened in 1966. And as you have surmised, whether or not, as the museum  
22 alleges, Knoedler participated in decisions, um, at an approach to be taken vis-a-vis  
23 the Italian government on the - as to whether or not Knoedler, uh, participated in  
24 the decision to stand by idly, um that (inaudible) standing by idly proved to be quite  
25 fruitful, certainly for a period of 30 to 40 years. Indeed, this is a case about

1 estoppel. This is a case about actions which the art dealer took, which permitted  
2 the museum to conduct its due diligence, as it deemed it had, uh, so performed on  
3 and then when the Italian government failed to respond, the museum to conclude  
4 that no cause of action was being pursued.

5

6 This is a case in estoppel which, I believe, draws a very fine line of distinction  
7 where it may lead to theories of fraudulent concealment and equitable tolling and,  
8 uh, the discovery rule. That's what this case is about. Uh, that - and in that regard,  
9 I would suggest that, um, the very well articulated argument that Attorney Salinger  
10 has just put, relative to this simply being a case about their warranty is incorrect.

11 This is a case which goes to the core of counts such as (inaudible) been able to  
12 (inaudible) and what obligations a merchant owes to a customer in order to conduct  
13 itself, uh, in a matter which would not move the customer to, uh, a possibly  
14 (inaudible) that it had conducted all relevant search and inquiry, that it conducted  
15 itself in due diligence, as the museum had done so in this particular case.

16

17 Um, I would like, just to clarify for the record, uh, to point to your attention, uh at  
18 the second amended complaint, our count that we report (inaudible). Um, a, both  
19 paragraph 39, line 2, where we specifically allege, uh, the deceit relating to those  
20 previous statements as their (inaudible) admissions. And it's that second term that  
21 is perhaps as salient. And more directly, to paragraph 41, which talks about, um -  
22 which alleges that as a result of notice, misrepresentation, (inaudible) and  
23 fraudulent concealments (inaudible) that Knoedler was not the lawful owner until  
24 about 19 - 2001 (inaudible).

25

1 J: Well, I - I'm not really - I think we have two different things here that as I may  
2 have confused Mr. Salinger initially. The fraudulent concealment, in a sense, is - is  
3 a concept, if you will, that's related to the statute of limitations. Um, and what I  
4 was really saying was in terms of the fraud, uh, count, usually when you have a  
5 fraud count under - under Rule 9, you know, you're held to a somewhat heightened  
6 level of pleading. And I don't know what - you know, what you're saying that -  
7 that the fraud was, I mean, that they actually knew - I mean, you don't know. And  
8 - and this is this - the issue about fraud. No matter how much - you've got to find  
9 out about fraud, so to speak, uh, during discovery and how much you need to plead  
10 it. But all that I was asking of Mr. Salinger was, um, whether or not he was seeking  
11 to dismiss that particular count, if you will, on failure to save a claim, or - or on  
12 Rule 9 principles, and he wasn't. He's not at that point here. Uh, I see here he's  
13 saying that everything needs to be thrown out, because whatever the, um -  
14 whatever the claims are, they all accrued and the statutes have gone on them.

15

16 So - but the fraudulent concealment, what are you saying would be the fraudulent  
17 concealment here vis-a-vis the statute of limitations claim running - assume for the  
18 moment that I accept your position that the - the, uh - that the statutes begin to run  
19 in 1966? Urn, what was concealed, what are you saying was fraudulently  
20 concealed from the museum by Knoedler?

21

22 MASON: What was concealed - the veracity of the statements set forth in that the, uh -  
23 the bill of sale, that the picture comes from Mrs. Peach, a Swiss lady in whose  
24 family the picture had remained for a very long time. That's the fraud. Or -

25

1 J: Is that how she pronounces - Mrs. Peach?

2

3 MASON: I believe so, only because I had a second grade teacher who spelled her name  
4 that way and she was Mrs. Peach. Uh, it might be Mrs. Peish, I don't know. Uh,  
5 but -

6

7 J: I called her Mrs. Peach. I mean, do you have - do you have - uh.

8

9 MASON: The fact of the matter is that - and the museum is supposed to do such  
10 testimony, urn, with its experts. It was very well known after World War II that  
11 much of the finest art in the world, uh, European art, had been looted by the Nazis.  
12 Knoedler, indeed, was one of the largest (inaudible) one of the largest art dealers in  
13 the world. Now we anticipate that we will be able to demonstrate that it knew or  
14 should have known that provenance of the painting at issue was suspect. Certainly  
15 to represent as they did in the bill of sale that the painting had been in a Swiss  
16 family for a "very long time," urn, uh, begs the question. And that's the level of  
17 fraud that we would allege. And stepping back, as one might surmise how this - on  
18 the picture, um (inaudible) will be depicted, urn, but these are circumstances where  
19 these (inaudible) alleges that Knoedler should have known that there was indeed a  
20 legitimate question. Importantly, there is correspondence, which we append to our  
21 opposition at, urn, Exhibit D, from Knoedler, that's the September 14, 1966 letter  
22 that you questioned, which truly does transcend on the, uh, the level of  
23 (inaudible)tation that Attorney Salinger (inaudible) is merely innocent.

24

1 And in that regard, um, Knoedler's representative says in paragraph 3, there was  
2 still an important point that we have not as yet resolved. And it goes on to what  
3 that point is. Next paragraph - and this quite poignant language - I have little  
4 knowledge of such things, but I feel positive that any court of law either here or  
5 abroad would demand such evidence. And it - then Knoedler's representative goes  
6 on to pose the various questions. And indeed, in the last correspondence in 1966,  
7 which is appended to our opposition at Exhibit E, the museum's director, Mr.  
8 Robinson, writes to, um, the director general of the, um, uh, Italian government,  
9 and um, (inaudible) that, um, their (inaudible) simply repeats what they had written.  
10 Still not proving to us that the Springfield painting is the one that you say is in the  
11 embassy. And it goes on to pose certain questions, questions which remain  
12 unresolved for a period of 34 years, questions which Knoedler - had Knoedler's  
13 participation (inaudible) as (inaudible) requested.

14

15 Indeed, this is a case that, uh, is all about equity. It's all about - I'll put it in  
16 quotes, "the doctrine of unclean hands" - to the extent that, um, that Knoedler, um,  
17 should be estopped in claiming that the statute of limitations arose in 1966 when  
18 they participated in a level of concealment.

19

20 J: Well, what are you - what are you say to Mr. Salinger's argument that, you know,  
21 Knoedler was raising these questions but it wasn't making any representation, but it  
22 particularly wasn't making any representations, uh, to forestall, um, the museum  
23 from making it - a claim against Knoedler?

24

1 MASON: He - I would draw your attention back to the September 14' letter, wherein in  
2 discussing, um, the veracity and the integrity of (multiple conversations; inaudible)

3

4

5 J: Which - there were two (inaudible) in here?

6

7 MASON: Exhibit B, I apologize.

8

9 J: Exhibit B?

10

11 MASON: Yes, of the opposition.

12

13 J: OK. Go ahead.

14

15 MASON: Um, and particularly if you read through the entire letter, um, the, uh,  
16 representations which are made refer to, um, in particular, whether or not the  
17 particular art historian's comments are anything more than, um, ambiguous further  
18 stating that on - this is in paragraph 3 - um, that no positive proof has been  
19 presented to you that the picture was actually in the Italian embassy in Warsaw.

20

21 J: OK. Go ahead.

22

23 MASON: Those are the - that is the level of representation. And I totally respect that the  
24 statute of limitations are - are here for a reason, so as not to revive claims that arose  
25 from 34, 37 years ago. But not at the expense of the plaintiff, who has been led

1 down such a (inaudible) path. That is not the purpose of the statute of limitations,  
2 and that's why, um, the doctrines of equitable tolling, encroachment, concealment,  
3 and the discovery rule apply. Having said all that, uh -

4

5 J: Well, let me just say -

6

7 MASON: Sure.

8

9 J: And I - I thought that I've asked this of Mr. Salinger himself. Isn't this the notion  
10 of, uh, estoppel - equitable estoppel somewhat different than the tolling? You  
11 seem to collapse the two.

12

13 MASON: I do in my mind, Your Honor, uh, because one leads to the other.

14

15 J: But the tolling, uh, has to do with the plaintiff here, the museum not having the  
16 information it needed to file suit within the limitations period, and could not have  
17 discovered it with reasonable due diligence. Your argument around tolling is based  
18 on the fact that there was a legitimate issue, OK, as to whether or not this was the,  
19 um - the art piece in - in question, OK?

20

21 MASON: Absolutely.

22

23 J: But let's assume, uh, for - for the moment, um, that there wasn't such a significant  
24 question about this being - being it, and that, if you will, the museum, uh, in an -  
25 so an unfavorable light says, you know, how can we delay this, how can - how can

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1 we push them off, how can we do those kinds of things, and Knoedler says, well,  
2 you know, let's ask them about this, let's ask them about that. So it's not a  
3 question of not knowing that whether or not you could file suit, although I guess it  
4 would be somewhat odd to want to hold on to the mus - uh, to the piece and sue  
5 Knoedler at the same time, although maybe that's what it would be like in, uh, you  
6 know, in an interpleading in some odd way, as a suing them, preserving your rights  
7 and having them prove that this is the piece and putting them to the test, putting  
8 Knoedler to the test of, uh, demonstrating that, uh, it was legitimately sold to you.

9

10 Uh, but that notion of equitable tolling is, uh - is distinct not from what you knew,  
11 but from actions which were taken under the - the equitable estoppel, uh, argument,  
12 aspect of your argument, having to do what the defendant did in making certain  
13 representations, uh, to you. Uh, and um -

14

15 MASON: And I suppose if I don't raise it (inaudible) in this stage of the litigation it's  
16 somewhat difficult for me to posit what exactly Knoedler knew at such a time.  
17 But I - I suppose but otherwise, and I fully intend to argue, um, this matter, was the  
18 notion that Knoedler is estopped. But getting back to your very legitimate question  
19 as to, well, let's presume for a brief moment that, um, that both that the museum  
20 and Knoedler really thought that this was a correct painting. All they were doing  
21 was just trying to ask the Italian embassy tough questions to maybe make them go  
22 away. It don't think it works quite that way when one is talking about an Old  
23 Master painter. Um, I don't think the Italian government just perceives (inaudible)  
24 just decides to (inaudible).

25

1 Um, indeed, perhaps, um, if one were to look back, that then shines some  
2 legitimacy on the level of questions that were being posed of, uh, the Italian  
3 government, such as the questions posed on September 21, 1966, let - last letter,  
4 uh, inquiring as to when the so-called theft was first discovered, by whom, when it  
5 was recorded, are there inventory records. Those were legitimate questions, so that  
6 there remained legitimate questions in the mind of the museum, certainly in the  
7 mind of Knoedler, as set forth in this letter, as to the integrity of the Italian  
8 government's claim.

9

10 J: So what - so what you're saying is this was, uh, part of the, uh, plaintiffs due  
11 diligence hearing at this point in time?

12

13 MASON: Absolutely.

14

15 J: And that you didn't know, and as long as the painting was in your hands, you didn't  
16 know that you could sue Knoedler?

17

18 MASON: Yes - yes, exactly. The - well, the second count of the equitable tolling  
19 standards, also the (inaudible) relates to some level of due diligence on it, and the  
20 museum maintains that it engaged in due diligence during the period, January of  
21 1966 through September of 1966. It engaged in a level of questions and answers  
22 between Knoedler and the Italian government to determine whether or not the  
23 painting in question was the stolen painting. And that, in effect, when the Italian  
24 government fails to respond in September 1966 for 34 years, uh, that that is - its  
25 actions speak louder, so to speak, than its words, and it ended up damning its

1 claimed, so to speak. Urn, and that as such, its decision not to return the painting  
2 on the - was - was gratified. Uh, and so its due diligence, in direct response to  
3 your question, was all that was done during the course of 1966.

4

5 J: OK.

6

7 MASON: And we've been arguing for some time, so I'm going to, um - telescope some  
8 of my comments to you. Um, the, uh - the gallery maintains that, uh, that Knoedler  
9 - uh, that the museum is not entitled to the protection of the, uh, discovery rule.  
10 Nonetheless, the museum had a reasonable basis to question whether or not it had  
11 good title, uh, to the painting of, uh - for that 34 year, um, that period. And we  
12 would suggest that, uh, that they level of damage that we had on the art (inaudible)  
13 justified the museum's forbearance on, um, any further discovery as to whether or  
14 not the painting was indeed a stolen painting.

15

16 At bare minimum, Your Honor, the, uh - um, and - the standard which the  
17 defendant in this matter is held to under (inaudible) has not been met. That is to  
18 say that certainly are you to accept all the allegations that we have set forth in our  
19 second amended complaint as true, that um, the defendant is not entitled to  
20 judgment as a matter of law. Uh, in many respects, the gallery's request of  
21 (inaudible) with all due respect to the gallery is premature. Uh, I would certainly -

22

23 J: What's - what's premature?

24

1 MASON: The gallery's request for dismissal of this matter is premature. Um, there are  
2 ancillary documents that are referred to in opinions that you do not have before  
3 you. We anticipate that there would be further evidence that used during the course  
4 of discovery, uh, in order to bolster the, uh, the museum's claim as well as to, um,  
5 cast doubt on Knoedler's defense. Um, in those many, many regards, there remain  
6 genuine issues of material fact such that the disposition of, um, the case at this very  
7 nascent stage is inappropriate.

8

9 J: Well, you know, let me just - OK, anything else?

10

11 MASON: I've already referred to the various paragraphs, um, that directly set forth  
12 counts for fraudulent concealment. And I think in many other respects we've  
13 covered all the bases in the past hour and a quarter, so -

14

15 J: OK. Um, Mr. Salinger, very briefly, the - usually an issue of accrual can be  
16 (inaudible) can be a question of fact for the jury. But assuming - what about the  
17 notion of tolling or equitable estoppel? Are those factual issues or are those  
18 questions of law? What do you believe?

19

20 SALINGER: The case law tells us that a motion for judgment on the pleadings is a  
21 classic way to resolve statute of limitations issues. That's true on the face of this  
22 second amended complaint as well. As we've set forth in our brief, uh, it's not  
23 enough in a complaint for a plaintiff to, uh, make conclusory allegations about  
24 tolling, to make conclusory allegations that we could not have known we had a  
25 claim or that there was some kind of fraudulent concealment. But the plaintiff has

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1 to - under First Circuit case law, has to plead sufficient facts to spell that out. Uh,  
2 the plaintiff didn't do so here because it can't do so here. Here what the undisputed  
3 facts tell us is that as of 1966, uh, at the latest, the museum knew that it had a  
4 potential claim against Knoedler, and it was trying to figure out what to do about it.  
5

6 Uh, there's no, uh, misconduct, no estoppel-type misconduct on behalf of Knoedler,  
7 given that Mr. Mason concedes that the questions Knoedler was raising were  
8 legitimate questions. Uh, one does not lose the protection of the statute of  
9 limitations by asking a - a potentially adverse party legitimate questions about the  
10 validity of a claim. All that's required - uh, again, assuming it did not accrue in  
11 1955 - all that's required for the limitations period to start running in 1966 is that  
12 the museum knew that it had a problem and that it might possibly have a claim  
13 against Knoedler. It chose to do nothing further after 1966. Um, it could have  
14 presented a claim against Knoedler in various forms, but it chose not to. It hoped  
15 that it would go away. Well, that hope is a fine, uh, perhaps logical strategic  
16 decision by the museum, but it's incapable, as a matter of law, of tolling the  
17 limitations period. And so this is an appropriate decision on the face of the  
18 pleadings, and is not a fact-bound question, uh, that - where factual findings would  
19 need to be made by a jury or otherwise.  
20

21 J: OK. I'll take it under advisement. Thank you. You know, actually, let me - you  
22 wanted to follow up on that. I'll take it - you know, a six page memo, if you want  
23 to, on your warranty issue, and I'll take another six page memo, uh, on the, uh,  
24 equitable estoppel issue. And if you could have that in, uh, my, uh - let's say a  
25 week from Wednesday, so (inaudible).

1

2 SALINGER: That would be fine, Your Honor.

3

4 J: (inaudible) one, two - February 4', is that right?

5

6 MASON: Thank you, Your Honor.

7

8 J: OK, thank you very much, gentlemen. Very nicely presented.

9

10 SALINGER: Thank you, Your Honor.

11 END OF TAPE

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